(2020) 07 P&H CK 0133

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 8415 Of 2020

Jagdamba Building Contractor APPELLANT

Vs

Employees State Insurance Corporation And Others RESPONDENT

Date of Decision : 29-07-2020

Acts Referred:

General Financial Rules, 2017 — Rule 144, 173, 173(iv), 173(xix)

Citation : (2020) 07 P&H CK 0133

Hon'ble Judges : Ravi Shanker Jha, CJ;Arun Palli, J

Bench : Division Bench

Advocate : Kunal Dawar, H.S.Bhatia

Final Decision : Dismissed

Judgement

Arun Palli, J

The mater is being taken up and heard by video conferencing owing to the prevailing Pandemic (COVID-19).

A writ in the nature of certiorari is prayed for to quash the order dated 31.01.2020 (Annexure P-12), passed by respondent No.2, vide which the

tender process, despite the petitioner-firm being technically compliant and having been declared L-I has since been scrapped. And, to set aside the

order dated 21.05.2020 (Annexure P-16) whereby even the representation moved by the petitioner-firm against cancellation of the tender process has

also been rejected. Further, to command the respondents to execute the work order in favour of the petitioner-firm, pursuant to the e-tender dated

08.08.2019 (Annexure P-3).

A brief narration of facts that have led the parties to the current stage shall be necessary and expedient.

Pursuant to the advertisement notice dated 08.08.2019, the Regional Office, Employees' State Insurance Corporation, Faridabad, invited e-tender

under two bids system for annual repair and maintenance of Civil and Electrical Works of ESI Hospitals/Staff Quarters/ESI Dispensaries/Branch

Offices situated in different districts in Haryana. The petitioner-firm submitted itâ??s bid for ESIC Hospital, Manesar. Upon technical evaluation by

the Tender Allotment Committee the petitioner and another tenderer namely SK Construction were found to be technically compliant/responsive. The

financial bids were opened on 20.11.2019 and the petitioner-firm was declared L-I for material and manpower. For, despite the bid of the petitioner-

firm being the lowest the respondents-authority did not issue any work order the petitioner-firm filed a declaratory suit along with an application for ad

interim injunction restraining the authority from cancelling the tender. In the written statement filed by the respondents in the said suit it was clarified

that after opening the financial bids the Allotment Committee had submitted a financial report to the Competent Authority for further orders. However,

the competent authority, while scrutinizing various documents found certain anomalies in the tender process and to investigate the matter further

constituted an independent committee. For, as per the report dated 22.01.2020, submitted by the Committee the tender process suffered from serious

anomalies the Additional Commissioner (ESIC), vide order dated 17.01.2020 (Annexure P-9), cancelled the tender and ordered re-tender. Whereafter

the application for ad interim injunction filed by the petitioner-firm was dismissed by the learned Civil Judge (Jr. Divn.), Faridabad on 30.01.2020.

Resultantly, the petitioner-firm withdrew the suit on 06.02.2020, to assail the cancellation of tender by way of a writ petition, before this Court. The

Writ Petition No.3959 of 2020 filed by the petitioner-firm, however, was disposed of on 13.02.2020, with liberty to the petitioner-firm to move the

authorities in the first instance. For, primarily the grievance of the petitioner-firm was that tender was cancelled without assigning any reasons. But as

the respondents even rejected the representation filed by the petitioner-firm, vide order dated 21.05.2020, thus this petition.

Learned counsel for the petitioner-firm submits that once the petitioner was found to be technically compliant/responsive and was declared L-I the

authorities, in the absence of any or plausible reasons, ought to have assigned the work order in its favour.

He asserts that all what the order dated 31.01.2020 (Annexure P-12), vide which the tender process was scrapped, conveys is that e-tenders are

cancelled for administrative reasons, and thus, the same is arbitrary.

Further, the decision of the authorities is mala fide for post cancellation of the tender the work has been assigned, though temporarily to one Krishna

builders without initiation of fresh process.

In reference to the Rules 173(iv) and (xix) of General Financial Rules, and Clause 5.6.8 of the Manual for Procurement of Works 2019, issued by the

Ministry of Finance, Department of Expenditure, Government of India, applicable to all tenders, he asserts that the decision of the authorities to

scrap/cancel the tender process was illegal being violative of those provisions, and thus, the order dated 21.05.2020 (Annexure P-16), vide which

though reasons have been assigned by the authority to cancel the tender process is also unsustainable. Learned counsel for the petitioner-firm,

in support of his submissions, has placed reliance upon Amit Brothers Vs. Chief Engineer R&D and Anr. of Delhi High Court LAWS (DLH)-2012-4-

463 and M/s Technofab Engineering Ltd. Vs. Bihar State Power (Holding) Company Limited, 2013 (3) BBCJ 101C, hief Manager, Oil India Limited

Vs. Om Parkash Bishnoi and Anr., 2013(17) SCT 617, and RSR Private Limited Vs. State of H.P. & Ors., 2017(6) ILR (HP) 241.

Per contra, learned counsel for the respondents submits for, while examining the records, the Competent Authority observed certain anomalies, and

thus, being of the view that matter required thorough investigation constituted a committee. And, as the report dated 06.01.2020, submitted by the said

committee revealed serious anomalies and discrepancies in the tender process, the Additional Commissioner, ordered cancellation of the tender.

Further, for some complaints were also received by the Vigilance Branch, concerning the illegalities the tender process suffered from, the report dated

06.01.2020, was also forwarded to the ESIC Headquarters', New Delhi, for further investigation and necessary action. He submits that one of the

bidders namely M/s S.K. Construction Company had also submitted a complaint dated 04.02.2020, to the Vigilance Division of ESIC Headquarters

and the Regional Office, ESIC Faridabad, has furnished detailed comments in this regard to the Headquarters and a vigilance inquiry is underway.

However, upon cancellation of the tender in question approval of the Competent

Authority of ESIC Headquarters has since been sought for inviting

fresh tender. Thus, he asserts that the petition at hands has been instituted only to delay and thwart the fresh process. As regards Rule 173 of the

GFR and the provisions of Manual for Procurement of Works 2019, he submits that the same have no bearing on the facts and circumstances of the

present case.

We have heard learned counsel for the parties and perused the records.

Undoubtedly, upon evaluation of the technical bid the petitioner-firm was found to be technically compliant/responsive. It is not disputed either that

upon opening the financial bids the petitioner-firm was declared L-I. But needless to assert that alone would not vest any enforceable right in the

petitioner-firm to claim mandamus requiring the respondents-authority to assign the work order in its favour. In this context it would be apposite even

to refer to certain clauses of the tender documents, which reads thus:-

â??Annexure C-I, Clause-8: The competent Authority of ESIC reserved the right to accept or reject any tender or all tenders or part

of tender without assigning any reason whatsoever. Annexure C-II, Clause-17:-

PURCHASERâ??S RIGHT TO ACCEPT ANY BID AND TO REJECT ANY OR ALL BIDS

The Purchaser reserves the right to accept or reject all or any bid, and to annul the bidding process at any time prior to award of contract without

assigning any reason whatsoever and without thereby incurring any liability to the affected bidder or bidders on the grounds for the Purchaser's

ACTION.

Annexure C-II, Clause-18:

SIGNING OF CONTRACT

18.1 The issue of firm purchase order and signing of agreement with Competent Authority of ESIC and Signing of Contract Form shall

constitute the award of contract to the bidder.â??

Ex facie, in terms of the tender conditions, referred to above, the right to reject all or any bid, and to annul the bidding process at any time prior to

award of contract without assigning reason rest with the authority. Further, in terms of Clause 18.1 (ibid) no concluded contract could be claimed to

have come in force between the parties unless signing of an agreement with Competent Authority of ESIC, contract form, and issuance of firm purchase order. Thus the argument that petitioner having been found technically compliant and declared L-I ought to have been assigned the work

order lacks conviction and cannot be countenanced.

The grievance of the petitioner-firm that the decision of the respondents-authorities as also the order dated 31.01.2020 (Annexure P-12), vide which

the tender process was cancelled was arbitrary, for, no reasons were assigned except that cancellation of e-tenders was ordered owing to

administrative reasons is equally misconceived. We are reminded to point out at this juncture that in the written statement filed by the respondents in

the suit it was clarified that it was owing to serious discrepancies in the tender process and to probe the matter conclusively, the Competent Authority

constituted a committee. And, based upon the findings and the report submitted by the said committee, the Competent Authority, vide order dated

17.01.2020, cancelled the tender. Not just that, and as indicated above, the representation submitted by the petitioner-firm, raising concerns regarding

arbitrary cancellation of the tender process, without assigning reasons, was dismissed by the respondents-authority vide order dated 21.05.2020

(Annexure P-16): â??on examining the report, the Competent Authority observed that the committee has pointed out several anomalies

in the tender process, which are prima facie, serious in nature. Not satisfied about the integrity of the tender process, the Competent

Authority accepted the report of the committee cancelled the tenders due to administrative reasons and ordered for fresh tenders.â??

Thus, the petitioner firm was conscious of the reasons that formed basis of the decision scraping the tender process and which is why the order dated

21.05.2020 is also being assailed.

There is yet another dimension to the matter: the order dated 25.06.2020, passed by the Co-ordinate Bench in the present case, reveals that what

essentially weighed with the Court while issuing notice of motion was that order cancelling the tender, allotted to the petitioner-firm, was passed

without assigning sufficient reasons: â??learned counsel for the petitioner inter alia contends that impugned rejection order has been

passed without mentioning any sufficient reason whereby the tender allotted to the petitioner has been cancelled and the decision of

the committee so constituted has not been mentioned in the order. He further submits that the act of the respondents is mala fide just

to oust the petitioner.â? We are afraid such is not the position. Concededly, the petitioner-firm was never allotted the tender. Further, the

reasons and the sequence of events that preceded scraping the tender process were duly set out in the order dated 21.05.2020 (Annexure P-16),

which too is under challenge. Thus, in the given circumstances, we wonder as to how it could still be maintained that the tender was cancelled without

any basis or assigning reasons.

The grievance of the petitioner that decision of the authorities to scrap the tender process is mala fide for post cancellation of the tender the work has

been allotted to a third party i.e. Krishna builders without initiating a fresh process also remains unsubstantiated. The authorities have clarified that

owing to the current crisis (COVID-19), the Central as also the State Government have issued orders for conversion of many ESIC hospitals to

Covid-19 treatment centers. Resultantly, with the approval of the competent authority, the maintenance contractors who were deployed pursuant to

previous contracts were given brief extension to ensure uninterrupted services in the hospitals.

Adverting to argument that decision of cancellation of the tender process is violative of the Rules 144 and 173 (iv) and (xix) of GFR 2017, which are

set out hitherto below as also clause 5.6.8 of Manual for Procurement of Works, 2019, would also not advance the cause of the petitioner-firm.

â??Rule 144 Fundamental Principles of Public Buying (for all Procurements including Procurement of Works). Every authority

delegated with the financial powers of procuring goods in public interest shall have the responsibility and accountability to bring

efficiency, economy, and transparency in matters relating to public procurement and for fair and equitable treatment of suppliers and

promotion of competition in public procurement. XXXXXXXXXX

Rule 173 Transparency, competition, fairness and elimination of arbitrariness in the procurement process:- All government purchases

should be made in a transparent, competitive and fair manner, to secure best value for money. This will also enable the prospective

bidders to formulate and send their competitive bids with confidence. Some of the measures for ensuring the above are as follows:-

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(iv) Suitable provision should be kept in the bidding document to enable a bidder to question the bidding conditions, bidding process

and/or rejection of its bid. The reasons for rejecting a tender or non-issuing a tender document to a prospective bidder must be

disclosed where enquiries are made by the bidder.

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(xix) Rejection of all Bids is justified when: a. effective competition is lacking.

b. all Bids and Proposals are not substantially responsive to the requirements of the Procurement Documents.

c. the Bids'/proposals' prices are substantially higher that the updated cost estimate or available budget; or

d. none of the technical Proposals meets the minimum technical qualifying score.â??

A bare analysis of Rule 144 of the GFR 2017, would rather suggests that every authority delegated with the financial/powers of procuring goods in

public interest shall be accountable to bring efficiency, economy and transparency in matters relating to public procurement. Likewise Rule 173

envisages transparency, competition, fairness and elimination of arbitrariness in the procurement process. As regards clauses

(iv and xix) of Rule 173 suffice it to say that those clauses have absolutely no bearing on the matter in issue. For, those become operative and assume

relevance only in the event of rejection of a technical bid and not in a situation where the tender process is scrapped. Likewise, as regards clause

5.6.8 of the Manual for Procurement of Works 2019, the specific stand set out by the respondents is that although the said clause provides for various

conditions for re-tender but it was also true that clause 7.2.2 of the Manual also required a satisfaction to be recorded as regards integrity of the public

procurement process against coercive, corrupt, obstructive practices as well as conflict of interest wherein any person from the procuring entity is

found having vested interest in any of the bidders.

And, as would be necessary we may now advert to the decision making process that preceded the decision scrapping the tender. At the time and stage of opening the financial bids the Competent Authority had received multiple complaints from various sources raising concerns qua the veracity

and fairness of the tender process. And, post opening the financial bids, when the Competent Authority, observed serious anomalies in the tender

process with a view to ensure transparency, fairness as also that the tender process was in conformity with the tender conditions, for, which the

matter required conclusive probe, vide order dated 17.12.2019 (Annexure R-4), a committee consisting of three officers i.e. Deputy Director

(General), Assistant Director (Vigilance) and Assistant Director (Treatment Benefit) was constituted. And, the report dated 06.01.2020 (Annexure R-

5) submitted by the said committee revealed inter alia: that one of the members of the tender evaluation committee did not sign the report. Secondly, a

complaint was received against two of the members of the evaluation committee being interested parties in the tender process. Further, one of the

members of the said committee had gone on leave but still signed the evaluation report even though another member was nominated in his place. Thus,

on the basis of the said report, the Competent Authority being dis-satisfied with the integrity of the tender process scrapped the tender. Significantly,

this is not the case of petitioner-firm that the reasons cited by the authority to cancel the tender are false or non-existent. Likewise, the petitioner-firm

failed to substantiate its allegations that the tender was scrapped with a mala fide intent to award work to a third party. Rather, the Competent

Authority being conclusively convinced that the tender process was fraught with multiple anomalies and serious illegalities cancelled not only the

tender in question but all the 10 tenders for different districts. Re-tender was ordered and therefore, the petitioner-firm shall be at liberty to participate

in the ensuing process.

As for, the decisions in Master Marine Services (P) Ltd., South Delhi Municipal Corporation and State of Jharkhand and others (supra) relied upon by

learned counsel for the petitioner, suffice, it to say that in the given facts and circumstances, those have no bearing on the matter in issue.

Thus, before we record our conclusion we may touch upon the scope and extent of interference in the administrative decision by this Court in exercise

of power of judicial review. Supreme Court in Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. and Anr. (2005) 6 SCC 13 8in para (12) held â??after an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court

enunciated the principle that the modern trend points to judicial restraint in administrative action. The Court does not sit as a court of

appeal but merely reviews the manner in which the decision was made. The court does not have the expertise to correct the

administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the

necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, fair play in the joints

is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However,

the decision must not only be tested by the application of Wednesbury principles of reasonableness but also must be free from

arbitrariness not affected by bias or actuated by mala fides.â??

In South Delhi Municipal Corporation Vs. Ravinder Kumar & Anr. (2015) 15 SCC 545, it was concluded: â??For the reasons stated

above, the High Court has failed to see that the appellant-Corporation adopted a fair and transparent method by inviting the bids for

the re-tender notice issued by it. The High Court has not found any malafide intention on the part of appellant-Corporation in inviting

the fresh bids after taking the decision to cancel its earlier tender notice. The appellant-Corporation, being the custodian of public

finance, took its decision objectively with a bonafide intention to serve the best interest of the public in general. Thus, for the

foregoing reasons, the appellant-Corporation has not committed any wrong in cancelling its earlier tender notice and issuing

subsequent tender notice afresh inviting bids from the eligible contractors.â??

In Civil Appeal No.6125 of 2016 (State of Jharkhand and others Vs. M/s CWE-SOMA Consortium) (2016) 14 SCC 172, the Supreme

Court in paragraph 14 of its judgment observed: â??The State derives its power to enter into a contract under Article 298 of the

Constitution of India and has the right to decide whether to enter into a contract with a person or not subject only to the requirement of

reasonableness under Article 14 of the Constitution of India.â??

Likewise, in Municipal Corporation, Ujjain & Anr. Vs. BVG India Limited and Ors. 2018(5) SCC 462, the Supreme Court in paragraph

10 its judgment observed â??the judicial review of administrative action is intended to prevent arbitrariness. The purpose of judicial

review of administrative action is to check whether the choice or decision is made lawfully and not to check whether the choice or

decision is sound. If the process adopted or decision made by the authority is not mala fide and not intended to favour someone; if the

process adopted or decision made is neither so arbitrary nor irrational that under the facts of the case it can be concluded that no

responsible authority acting reasonably and in accordance with relevant law could have reached such a decision. And if the public

interest is not affected, there should be no interference under Article 226.â??

In the wake of the position, as sketched out above, the only and the inevitable conclusion we could reach: the decision making process that preceded

the decision of the Competent Authority to cancel/scrap the tender process was neither unfair, nor arbitrary. Not actuated by any malafide either. On

the contrary being just, bona fide and resorted to in public interest warrants no interference by this Court.

The petition being bereft of merit is accordingly dismissed.

